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DELICATO VINEYARDS
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15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 DELICATO VINEYARDS, a California
18 corporation,

19 Plaintiff,

20 v.

21 ALEXA COHN, KATIE BARRY, and
ANDREW COHN, individuals, and
22 FEMME BOTA, LLC, an Arizona limited
liability company, d/b/a BOTA
23 BACKPACK,

24 Defendants.

) Case No. 3:20-cv-7668-JSC

) **FIRST AMENDED COMPLAINT FOR**
) **TRADEMARK INFRINGEMENT,**
) **FALSE DESIGNATION OF ORIGIN,**
) **UNFAIR COMPETITION, AND**
) **CANCELLATION OF TRADEMARK**
) **REGISTRATION**

) **DEMAND FOR JURY TRIAL**
)
)
)
)

1 Plaintiff Delicato Vineyards (“Delicato”) hereby complains of Defendants Alexa Cohn,
2 Katie Barry, Andrew Cohn (collectively, the “Individual Defendants”), and Femme Bota, LLC
3 (“Femme Bota”) and alleges as follows:

4 **I. INTRODUCTION**

5 1. Delicato is a family-owned wine company that was founded in California in
6 1924. For more than 90 years, the Indelicato family has owned and operated Delicato
7 Vineyards, which is one of the fastest growing top-ten wine companies in the United States.
8 Delicato has offered wine under the distinctive trademarks BOTA[®], BOTA BOX[®], BOTA
9 MINI[®], and BOTA BRICK[®] (collectively, “BOTA[®] Marks”) for almost seventeen years and,
10 through significant time, effort, and expense, Delicato has amassed considerable goodwill in
11 its BOTA[®] Marks. Recently, Delicato learned that Femme Bota began using the identical
12 BOTA mark and confusingly similar BOTA BACKPACK mark in connection with its
13 products, including backpacks for carrying beverages.

14 **II. INTRADISTRICT ASSIGNMENT**

15 2. This action is an intellectual property action subject to district-wide assignment
16 pursuant to Local Civil Rules 3-2(c) and 3-5(b).

17 **III. JURISDICTION AND VENUE**

18 3. This is an action for (1) trademark infringement under 15 U.S.C. § 1114,
19 (2) trademark infringement and false designation of origin under 15 U.S.C. § 1125(a),
20 (3) petition for cancellation of U.S. Trademark Registration No. 5,922,942, (4) unfair
21 competition under California Business & Professions Code §§ 17200, *et seq.*, and (5) California
22 common law unfair competition.

23 4. The Court has original subject matter jurisdiction over the claims that relate to
24 trademark infringement, false designation of origin, and cancellation of a U.S. Trademark
25 Registration pursuant to 15 U.S.C. §§ 1116 and/or 1121(a) and also pursuant to 28 U.S.C.
26 §§ 1331 and 1338, as these claims arise under the laws of the United States. The Court has
27 supplemental jurisdiction over the claims in this Complaint that arise under state statutory and
28 common law pursuant to 28 U.S.C. §§ 1338(b) and 1367(a), because the state law claims are

1 so related to the federal claims that they form part of the same case or controversy and derive
2 from a common nucleus of operative facts.

3 5. This Court has personal jurisdiction over Femme Bota because Femme Bota has
4 a continuous, systematic, and substantial presence within this Judicial District and within
5 California. Femme Bota's office is located within this Judicial District at 275 South Maple
6 Avenue, South San Francisco, California. Femme Bota advertises, markets, promotes, sells,
7 and offers to sell its products in California, including in this Judicial District. In addition, by
8 committing acts of trademark infringement, false designation of origin, and unfair competition
9 in this Judicial District, including, but not limited to, by using infringing marks in connection
10 with the advertisement, marketing, promotion, sale, and offer for sale of goods to customers in
11 this Judicial District, Femme Bota's acts form a substantial part of the events or omissions
12 giving rise to Delicato's claims.

13 6. This Court has personal jurisdiction over the Individual Defendants because the
14 Individual Defendants reside in California or did so at the time of the events giving rise to this
15 Complaint. In addition, the acts forming a substantial part of the events or omissions giving
16 rise to Delicato's claim against the Individual Defendants occurred in California.

17 7. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) and (c)
18 as to Femme Bota at least because Femme Bota conducts business as Bota Backpack, which
19 has a principal place of business in this Judicial District, and a substantial portion of the
20 events complained of herein have taken place in this Judicial District.

21 8. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) and (c)
22 as to the Individual Defendants at least because the Individual Defendants reside in California,
23 or did so at the time of the events giving rise to this Complaint, and the acts forming a
24 substantial part of the events or omissions giving rise to Delicato's claim against the Individual
25 Defendants occurred in California.

IV. THE PARTIES

9. Delicato is a corporation organized and existing under the laws of the State of California, having a principal place of business at 12001 South Highway 99, Manteca, California 95336.

10. Femme Bota is a limited liability company organized and existing under the laws of the State of Arizona, having a principal place of business at 702 E. Osborn Road, #200, Phoenix, AZ 85014, and doing business as Bota Backpack, having a principal place of business at 275 South Maple Avenue, South San Francisco, California. Attached hereto as **Exhibit A** is a true and correct copy of the Articles of Organization for Femme Bota, approved by the Arizona Corporation Commission.

11. Delicato is informed and believes, and based thereon alleges that Defendant Alexa Cohn is an individual residing at 2664 Harrison Street, San Francisco, California 94110. Alexa Cohn is a member and the sole manager of Femme Bota. Upon information and belief, Alexa Cohn is identified as a team member of Bota Backpack. Attached hereto as **Exhibit B** is a true and correct copy of the webpage <https://botabackpack.com/pages/team-bota> (last accessed on November 19, 2020) identifying “Alexa and Katie” as members of “Team Bota.”

12. Delicato is informed and believes, and based thereon alleges that Defendant Katie Barry is an individual residing at 40 Harrison Street, Apartment F, New York, New York 10013. Delicato is informed and believes, and based thereon alleges that Defendant Katie Barry resided in California and this judicial district at the time of the acts forming a substantial part of the events or omissions giving rise to Delicato’s claim against the Individual Defendants. Katie Barry is a member of Femme Bota. Upon information and belief, Katie Barry is identified as a team member of Bota Backpack. *See* Exhibit B.

13. Delicato is informed and believes, and based thereon alleges that Defendant Andrew Cohn is an individual residing at 6019 East Mariposa Street, Scottsdale, Arizona 85251. Defendant Andrew Cohn also has a home in and resides in Newport Beach, California.

V. GENERAL ALLEGATIONS

14. Delicato is a family-owned and operated wine company that has been dedicated

1 to innovation, quality, and environmental stewardship since its founding in California in 1924.
2 Four generations of the Indelicato family have worked tirelessly to create superior quality
3 wines. These tremendous efforts have made Delicato not only one of the fastest growing top-
4 ten wine companies in the United States, but also one that is perennially recognized for its
5 quality.

6 15. In 2003, long before Defendants' acts described herein, Delicato began using
7 the BOTA[®] Marks for wine. Delicato regularly sells over five million cases of wine per year
8 under the BOTA[®] Marks through major retail outlets in all 50 states and internationally.

9 16. Delicato's wines sold under the BOTA[®] Marks have received Shanken's Impact
10 Hot Brand awards each year for the last twelve consecutive years and more than fifty "Best
11 Buy" awards from *Wine Enthusiast*.

12 17. Delicato owns U.S. Trademark Registration No. 3,519,182 (the "'182
13 Registration") for the BOTA BOX[®] mark, which was filed on September 14, 2007. Attached
14 hereto as **Exhibit C** is a true and correct copy of the '182 Registration, which is incorporated
15 by reference. Pursuant to 15 U.S.C. § 1065, the '182 Registration is incontestable.

16 18. Delicato owns U.S. Trademark Registration No. 4,606,926 (the "'926
17 Registration") for the BOTA MINI[®] mark, which was filed on July 26, 2013. Attached hereto
18 as **Exhibit D** is a true and correct copy of the '926 Registration, which is incorporated by
19 reference. Pursuant to 15 U.S.C. § 1065, the '926 Registration is incontestable.

20 19. Delicato owns U.S. Trademark Registration No. 4,581,650 (the "'650
21 Registration") for the BOTA[®] mark, which was filed on July 26, 2013. Attached hereto as
22 **Exhibit E** is a true and correct copy of the '650 Registration, which is incorporated by
23 reference. Pursuant to 15 U.S.C. § 1065, the '650 Registration is incontestable.

24 20. Delicato owns U.S. Trademark Registration No. 4,693,255 (the "'255
25 Registration") for the BOTA BRICK[®] mark, which was filed on November 19, 2013. Attached
26 hereto as **Exhibit F** is a true and correct copy of the '255 Registration, which is incorporated
27 by reference. Pursuant to 15 U.S.C. § 1065, the '255 Registration is incontestable.

1 21. As a result of Delicato's long, continuous, extensive and exclusive use of the
2 BOTA® Marks, as well as its marketing, promotion, and sale of products under the marks, the
3 relevant public has come to recognize the BOTA® Marks as identifying products that originate
4 from or are otherwise associated exclusively with Delicato. Delicato has spent enormous, time,
5 effort, and expense to create valuable goodwill in the BOTA® Marks.

6 22. At least fifteen years after Delicato started using the BOTA® Marks for wine,
7 Femme Bota began using the BOTA and BOTA BACKPACK marks in connection with
8 backpacks for carrying beverages.

9 23. On April 18, 2018, the Individual Defendants filed U.S. Trademark Application
10 No. 87/788,3248 for the BOTA BACKPACK mark for "Backpacks for carrying hydrating
11 fluids, not to include alcoholic beverages; Backpacks compatible with personal hydration
12 systems, sold empty." During the prosecution of this application, the Individual Defendants
13 agreed to a disclaimer for "BACKPACK." On November 26, 2019, the Individual Defendants'
14 trademark application matured into U.S. Registration No. 5,922,942 ("the '942 Registration").
15 Attached hereto as **Exhibit G** is a true and correct copy of the '942 Registration, which is
16 incorporated by reference.

17 24. Delicato is informed and believes that the Individual Defendants have licensed
18 the '942 Registration and the BOTA BACKPACK mark to Femme Bota.

19 25. On May 5, 2020, Delicato sent Defendant Alexa Cohn, a member and the sole
20 manager of Femme Bota, a cease and desist letter demanding that Defendants cease using the
21 BOTA and BOTA BACKPACK marks. Attached hereto as **Exhibit H** is a true and correct
22 copy of Delicato's cease and desist letter dated May 5, 2020.

23 26. Despite Delicato's letter dated May 5, 2020, Femme Bota has continued to use
24 the BOTA and BOTA BACKPACK marks.

25 27. Defendants are not affiliated with Delicato. Delicato has never given
26 Defendants license, permission or authority to use or display the BOTA® Marks or any similar
27 marks.

28 28. Femme Bota has attempted to capitalize on Delicato's valuable reputation and

1 customer goodwill in the BOTA® Marks by using the identical BOTA mark and confusingly
2 similar BOTA BACKPACK mark in connection with the advertisement, marketing, promotion,
3 sale, and/or offer for sale of backpacks for carrying beverages. Femme Bota's backpacks for
4 carrying beverages sold in connection with the identical BOTA mark and confusingly similar
5 BOTA BACKPACK mark are highly related to Delicato's products which are beverages.

6 29. As an example, Femme Bota d/b/a Bota Backpack, sells the "Mayfair" backpack
7 with the BOTA mark on its website. Attached hereto as **Exhibit I** is a true and correct copy of
8 the webpage <https://botabackpack.com/collections/backpacks/products/the-mayfair> (last
9 accessed on November 19, 2020) illustrating the "Mayfair" backpack for sale on the Bota
10 Backpack website.

11 30. Femme Bota was aware of Delicato's BOTA® Marks at least as early as May 5,
12 2020 when Delicato sent its cease and desist letter to Femme Bota's member and sole manager,
13 Alexa Cohn. Despite being aware of Delicato's cease and desist letter, Femme Bota has
14 continued to use the infringing BOTA and BOTA BACKPACK marks.

15 31. Without permission or consent from Delicato, Femme Bota has infringed
16 Delicato's BOTA® Marks in interstate commerce by advertising, marketing, promoting,
17 selling, and/or offering to sell products under the BOTA and BOTA BACKPACK marks.

18 32. Delicato is informed and believes, and based thereon alleges that Femme Bota's
19 actions alleged herein are intended to cause confusion, mistake, or deception as to the source
20 of Femme Bota's products and are intended to cause consumers and potential customers to
21 believe that Femme Bota's products are associated with, sponsored by, originate from, or are
22 approved by, Delicato, when they are not.

23 33. By virtue of the acts complained of herein, Femme Bota has created a likelihood
24 of injury to Delicato's business reputation and goodwill, caused a likelihood of consumer
25 confusion, mistake, and deception as to the source of, origin or relationship of Femme Bota's
26 products with Delicato, and have otherwise competed unfairly with Delicato by unlawfully
27 trading on and using Delicato's BOTA® Marks without Delicato's permission or consent.

1 42. Femme Bota's activities complained of herein constitute willful and intentional
2 infringement of Delicato's registered trademarks.

3 43. Delicato is informed and believes, and based thereon alleges that Femme Bota
4 had actual knowledge of Delicato's ownership and prior use of the BOTA[®] Marks, and that
5 Femme Bota has willfully infringed Delicato's trademark rights under 15 U.S.C. § 1114.

6 44. Femme Bota, by its actions, have damaged Delicato in an amount to be
7 determined at trial.

8 45. Femme Bota, by its actions, have irreparably injured Delicato. Such irreparable
9 injury will continue unless Femme Bota is preliminarily and permanently enjoined by this
10 Court from further violating Delicato's rights, for which Delicato has no adequate remedy at
11 law.

12 **VII. SECOND CLAIM FOR RELIEF**

13 (Trademark Infringement and False Designation of Origin

14 under 15 U.S.C. § 1125(a))

15 46. Delicato hereby repeats, realleges, and incorporates by reference paragraphs 1-
16 45 of this Complaint as though fully set forth herein.

17 47. This is a claim for trademark infringement and false designation of origin
18 against Femme Bota under 15 U.S.C. § 1125(a).

19 48. As a result of Delicato's widespread use and promotion of the BOTA[®] Marks,
20 the marks have acquired strong secondary meaning to consumers and potential customers, in
21 that consumers and potential customers have come to associate the BOTA[®] Marks with
22 Delicato. Delicato's BOTA[®] Marks are also inherently distinctive.

23 49. Femme Bota has infringed the BOTA[®] Marks and created a false designation of
24 origin by using in commerce, without Delicato's permission, identical and confusingly similar
25 marks in connection with the advertising, marketing, promotion, sale, and/or offer for sale of
26 Femme Bota's products.

27 50. Femme Bota's actions are likely to cause confusion and mistake, or to deceive
28 as to the affiliation, connection, or association of Femme Bota with Delicato, and/or as to the

1 origin, sponsorship, or approval of Femme Bota's products or commercial activities, in
2 violation of 15 U.S.C. § 1125(a).

3 51. Delicato is informed and believes, and based thereon alleges that Femme Bota
4 has done so with the intent to trade upon Delicato's reputation and goodwill by causing
5 confusion and mistake among customers and the public and to deceive the public into believing
6 that Femme Bota's products are associated with, sponsored by, or approved by Delicato, when
7 they are not.

8 52. Delicato is informed and believes, and based thereon alleges that Femme Bota
9 had actual knowledge of Delicato's ownership and prior use of the BOTA® Marks and, without
10 Delicato's consent, willfully violated 15 U.S.C. § 1125(a).

11 53. Femme Bota, by its actions, has damaged Delicato in an amount to be
12 determined at trial.

13 54. Femme Bota, by its actions, has irreparably injured Delicato. Such irreparable
14 injury will continue unless Femme Bota is preliminarily and permanently enjoined by this
15 Court from further violating Delicato's rights, for which Delicato has no adequate remedy at
16 law.

17 **VIII. THIRD CLAIM FOR RELIEF**

18 (Petition for Cancellation of U.S. Trademark Registration No. 5,922,942)

19 55. Delicato hereby repeats, realleges, and incorporates by reference paragraphs 1-
20 54 of this Complaint as though fully set forth herein.

21 56. This is a claim for cancellation of the Individual Defendants' U.S. Trademark
22 Registration No. 5,922,942 under 15 U.S.C. § 1119.

23 57. Since at least 2003, many years before the first use, filing, and registration dates
24 of U.S. Trademark Registration No. 5,922,942, Delicato has continuously used its BOTA®
25 Marks in connection with its products. By virtue of Delicato's continuous and substantial use
26 of its BOTA® Marks, the BOTA® Marks have become strong identifiers of Delicato and its
27 products, and distinguish Delicato's products from those of others. Delicato has built up
28 significant and valuable goodwill in its BOTA® Marks.

58. Delicato owns valid and enforceable federally registered trademarks for the BOTA® Marks. The filing dates of the '182 Registration, '926 Registration, '650 Registration, and '255 Registration are all prior to the filing date of the Individual Defendants' U.S. Trademark Registration No. 5,922,942.

59. Delicato will be damaged by continued registration of the Individual Defendants' U.S. Trademark Registration No. 5,922,942 in that the BOTA BACKPACK mark shown therein is confusingly similar to Delicato's BOTA® Marks. The registration and use of the BOTA BACKPACK mark shown in U.S. Trademark Registration No. 5,922,942 in connection with the goods identified therein, namely, backpacks that carry beverages, are likely to cause confusion, or to cause mistake or to deceive within the meaning of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

60. In view of Delicato's prior rights and trademark registrations for the BOTA® Marks, the Individual Defendants are not entitled to federal registration of the BOTA BACKPACK mark shown in U.S. Trademark Registration No. 5,922,942, and this registration should be cancelled.

IX. FOURTH CLAIM FOR RELIEF

(Unfair Competition under California Business &
Professions Code §§ 17200 *et seq.*)

61. Delicato hereby repeats, realleges, and incorporates by reference paragraphs 1-60 of this Complaint as though fully set forth herein.

62. This is a claim against Femme Bota for unfair competition under California Business & Professions Code §§ 17200, *et seq.*

63. By virtue of the acts complained of herein, Femme Bota has intentionally caused a likelihood of confusion among consumers and the public and has unfairly competed with Delicato in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*

64. Femme Bota's acts complained of herein constitute trademark infringement, unfair competition, and unlawful, unfair, or malicious business practices, which have injured and damaged Delicato.

1 65. Femme Bota, by its actions, has irreparably injured Delicato. Such irreparable
2 injury will continue unless Femme Bota is preliminarily and permanently enjoined by this
3 Court from further violating Delicato's rights, for which Delicato has no adequate remedy at
4 law.

5 **X. FIFTH CLAIM FOR RELIEF**

6 (California Common Law Unfair Competition)

7 66. Delicato hereby repeats, realleges, and incorporates by reference paragraphs 1-
8 65 of this Complaint as though fully set forth herein.

9 67. This is a claim against Femme Bota for unfair competition under the common
10 law of the State of California.

11 68. Femme Bota's acts complained of herein constitute trademark infringement and
12 unfair competition under the common law of the State of California.

13 69. By virtue of the acts complained of herein, Femme Bota has willfully and
14 intentionally caused a likelihood of confusion among the purchasing public in this Judicial
15 District and elsewhere, thereby unfairly competing with Delicato in violation of the common
16 law of the State of California.

17 70. Femme Bota's aforementioned acts have damaged Delicato in an amount to be
18 determined at trial.

19 71. Femme Bota has irreparably injured Delicato. Such irreparable injury will
20 continue unless Femme Bota is preliminarily and permanently enjoined by this Court from
21 further violating Delicato's rights, for which Delicato has no adequate remedy at law.

22 72. Femme Bota's willful acts of unfair competition under California common law
23 constitute fraud, oppression and malice. Accordingly, Delicato is entitled to exemplary
24 damages pursuant to Cal. Civ. Code Section § 3294(a).

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Delicato prays for judgment against Defendants as follows:

27 A. That the Court render a final judgment in favor of Delicato and against
28 Defendants on all claims for relief alleged herein;

1 B. That the Court render a final judgment that Femme Bota has willfully violated
2 the provisions of 15 U.S.C. § 1114 by infringing Delicato's trademark rights in at least the
3 marks that are the subject of Delicato's U.S. Trademark Registration Nos. 3,519,182,
4 4,606,926, 4,581,650, and 4,693,255;

5 C. That the Court render a final judgment that Femme Bota has violated the
6 provisions of 15 U.S.C. § 1125(a) by willfully infringing the BOTA® Marks by using a false
7 designation of origin, through the marketing, sale, and promotion of Femme Bota's products;

8 D. That the Court direct the United States Patent and Trademark Office to cancel
9 U.S. Trademark Registration No. 5,922,942;

10 E. That the Court render a final judgment declaring that Femme Bota has violated
11 California Business and Professions Code §§ 17200, *et seq.* by committing trademark
12 infringement and unfairly competing with Delicato;

13 F. That the Court render a final judgment declaring that Femme Bota has violated
14 California common law by unfairly competing with Delicato;

15 G. That Feme Bota, its agents, servants, employees, attorneys, successors, and
16 assigns, and all other persons in active concert or participation with Femme Bota be enjoined
17 from:

18 i. using the BOTA mark, the BOTA BACKPACK mark, or any other mark
19 that is confusingly similar to the BOTA® Marks in connection with the advertisement,
20 marketing, promotion, sale, or offer for sale of Femme Bota's products, including, but
21 not limited to, products related to wine;

22 ii. using the BOTA mark, BOTA BACKPACK mark, or any confusingly
23 similar variation of the BOTA® Marks in any manner that is likely to create the
24 impression that Femme Bota's products originate from Delicato, are endorsed by
25 Delicato, or are connected in any way with Delicato;

26 iii. filing any applications for registration of the BOTA mark, any
27 trademarks including "BOTA", or any other mark that is confusingly similar to the
28 BOTA® Marks;

- iv. falsely designating the origin of Femme Bota's products;
- v. unfairly competing with Delicato in any manner whatsoever; and,
- vi. causing a likelihood of confusion or injury to Delicato's business reputation;

H. That Femme Bota be directed to file with this Court and serve on Delicato within thirty (30) days after the service of the injunction, a report, in writing, under oath, setting forth in detail the manner and form in which they have complied with the injunction pursuant to 15 U.S.C. § 1116;

I. That Femme Bota be required to account to Delicato for any and all profits derived by Femme Bota and all damages sustained by Delicato by virtue of Femme Bota's acts complained of herein;

J. That Femme Bota be ordered to pay Delicato all damages which Delicato has sustained as a consequence of the acts complained of herein, subject to proof at trial, together with prejudgment and post-judgment interest;

K. That this case be deemed exceptional and the amount of damages be trebled and that the amount of profits be increased by as many times as the Court deems appropriate, pursuant to 15 U.S.C. § 1117;

L. That Delicato be awarded exemplary damages from Femme Bota pursuant to Cal. Civ. Code. § 3294;

M. That Femme Bota's actions be deemed willful;

N. That an award of reasonable costs, expenses, and attorneys' fees be awarded to Delicato pursuant to at least 15 U.S.C. § 1117;

O. That Femme Bota be required to deliver and destroy all devices, literature, advertising, goods, packaging, and other unauthorized materials bearing the BOTA mark, the BOTA BACKPACK mark, or any confusingly similar marks, pursuant to 15 U.S.C. § 1118;

P. That Delicato be awarded restitution and disgorgement; and,

Q. That Delicato be awarded such other and further relief as this Court may deem just.

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Respectfully submitted,
KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: November 19, 2020

By: /s/ Paul A. Stewart
Paul A. Stewart
Ali S. Razai
Nicole Rossi Townes
David G. Kim

Attorneys for Plaintiff,
DELICATO VINEYARDS

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DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff Delicato Vineyards hereby demands a trial by jury on all issues so triable.

Respectfully submitted,
KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: November 19, 2020 By: /s/ Paul A. Stewart
Paul A. Stewart
Ali S. Razai
Nicole Rossi Townes
David G. Kim

Attorneys for Plaintiff,
DELICATO VINEYARDS

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